

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 23.05.2006

CORAM:

THE HON 'BLE MR. JUSTICE K.MOHAN RAM

A.S.No.98 of 1992

Kaleeswara Mills Limited
(A Unit of National Textile Corporation
Tamil Nadu & Pondicherry)
10/8 Anuppar Palayam,
Coimbatore - 9.

... Appellant
(1st defendant)

-Vs-

1. M/s. Lakshmi Steals
Rep. By its Partner, Mr. R.Rajasekaran
85, C.Rankonar Street, Kattur,
Coimbatore - 9.

2. M/s. Kumar Enterprises,
Kaleeswarar Nagar,
Kattur, Coimbatore - 9.

... Respondents.
(Plaintiff & 2nd defendant)

Appeal against the Judgment and Decree made in O.S.No.561 of 1985 on the file of the III-rd Additional Sub-Court, Coimbatore dated 27.06.1991.

For Appellant : Mr. N.Sridhar, for Mr.S. Kadarkarai,

For Respondents : Mr. S.Parthasarathy, Senior Counsel, for
Mr. S.Thangasivam for R-1 and
Mr. J.Raja kalifullah for R-2.

सत्यमेव जयते

J U D G M E N T

Being aggrieved by the judgment and decree dated 27.06.1991 made in O.S.No.561 of 1985 on the file of the III Additional Sub-Court, Coimbatore the first defendant has filed the above appeal.

2. For the sake of convenience, the parties are referred to as per their ranking in the suit.

3. The case of the plaintiff as pleaded in the plaint is set out below:

- (i) The first defendant in or about January 1985 called for tenders and invited offers from the general public for the purchase of two building sites Nos.2 and 10 of an extent of about 9 cents each, the former at the minimum rate of

Rs.18,000/- per cent and the latter at the minimum rate of Rs.15,000/-, fixing 14.02.1985 as the last date for receiving tender. The plaintiff sent its tender forms for the purchase of plot No.10B measuring about 8.425 cents and enclosed a banker's cheque, dated 13.02.1985 for Rs.10,000/- representing initial deposit amount.

- (ii) The first defendant accepted the plaintiff's offer by sending its letter of confirmation, dated 11.05.1985 and required the plaintiff to remit the balance price of Rs.1,97,338/- by means of a demand draft and further required the plaintiff to purchase the necessary stamp papers to enable the first defendant to prepare and execute the document early. The plaintiff by letter dated 23.05.1985 requested the first defendant to send the plan of the site showing the measurements and boundaries so that the plaintiff could prepare and send the draft sale deed for the first defendant's approval and indicated thereby that it was ready and willing to perform its part of the obligation.
- (iii) Ever since the time when the contract was concluded and confirmed, viz, on and from 11.05.1985 the plaintiff was, has been and continues to be ready and willing to perform its part of the obligation under the contract and the plaintiff even now has the money ready, in the form of bank deposit receipts standing in the names of the partners.
- (iv) The plaintiff bona fide expected the first defendant to furnish the plan of the suit property to enable the plaintiff to incorporate the description of the property in the sale deed and the partners of the plaintiff were in touch with the officers of the first defendant between 11.05.1985 and 22.06.1985. The first defendant made the plaintiff to understand that its office would send the needed particulars in due course and the plaintiff could wait to discharge its obligations till then.
- (v) While so the plaintiff received the first defendant's letter, dated 22.06.1985 on 24.06.1985, stating that in view of the alleged non-compliance of clauses (8) and (9) of the tender terms, the plaintiff's offer was treated as cancelled and the deposit amount of Rs.10,000/- was forfeited. The plaintiff was made to believe that it would take some time for finalizing the draft sale deed itself and the question of payment of balance price could arise only after approval of the draft sale deed. The first defendant's cancellation of the contract is untenable in law, unreasonable and unjustified in the light of their confirmation letter, dated 11.05.1985, in and by which, the plaintiff was required to pay the entire balance price and not as per clauses (8) and (9). The first defendant ought to have given the notice of cancellation before 30 days from 11.05.1985, expressing its intention to avoid the contract for the alleged non-performance of payment, assuming without admitting that time was the essence of the contract. In contracts relating to immovable property, time is not the essence of the contract. In the instant

case, time was never agreed to be the essence of the contract and at any rate not expressly agreed to be so. Nor did the first defendant purport to treat time as the essence of the contract at any time before 22.06.1985.

- (vi) The plaintiff immediately approached the first defendant on 26.06.1985 itself with the bank draft for Rs.1,97,338/- drawn in favour of the first defendant and tendered it to the first defendant, but the first defendant refused to receive it. Thereupon, the legal notice dated 29.06.1985 was sent enclosing the bank draft for Rs.1,97,338/- and requiring the first defendant to execute the sale deed. The first defendant sent a belated reply dated 24.07.1985 to the plaintiff, returning the bank draft therewith. The first defendant's purported act of treating the deposit amount as having been forfeited is untenable. The second defendant is the next tenderer and so the second defendant is also impleaded. The plaintiff has prayed for a judgment and decree directing the first defendant to execute the sale deed in plaintiff's favour in respect of the suit property; to put the plaintiff in possession of the suit property or in the alternative to direct the first defendant to pay Rs.50,000/- by way of damages to the plaintiff; to refund the deposit amount of Rs.10,000/- and to pay future interest on Rs.60,000/- till date of realization and for costs.

4. The first defendant has filed a detailed written statement containing the following defence:-

- (i) The plaintiff is not entitled to the discretionary relief of specific performance. The plaintiff has committed breach with regard to the terms and conditions of the tender. As per Clause No.8, on receipt of intimation of acceptance of tender, the successful tenderer shall within a period of 20 days from the date of such a letter, remit 50% of the value of the site allotted to him by Demand Draft and shall within a period of 30 days from the date of the said letter arrange to pay the balance of the price and take the sale deed at its cost. As per Clause No.8, the plaintiff should have further remitted the balance of 50% of the value within 30 days from 11.05.1985 i.e. on or before 10.06.1985 and since the plaintiff failed to make the remittances as per Clause No.8 of the tender conditions there is no concluded contract at all, which can be enforced in a Court of law.
- (ii) The plaintiff did not make any request for any plan of the suit property. Even otherwise the plaintiff had all the particulars available with them before the offer was made and even if such request was true it was only made to gain time. The plaintiff was not ready and willing to perform its part of the contract. The plaintiff and its partners were not periodically in touch with the first defendant between 11.05.1985 and 22.06.1985. The averment that the first defendant made the plaintiff to

understand that the details sought for by it will be sent in due course and the plaintiff can await for discharging its obligations is not true. There is no need to issue notice of cancellation before 30 days from 11.05.1985. The belated bank draft manipulated by the plaintiff would not advance their case.

5. The second defendant has filed a written statement with the following contentions:-

- (i) The plaintiff failed to perform conditions stipulated in clauses 8 and 9 of the tender contract. This defendant being the next highest tenderer is entitled to compel the first defendant to accept their offer and confirm the sale in their favour. The contract in favour of the plaintiff stands rejected on account of default committed by the plaintiff and as such the plaintiff is not entitled to compel the first defendant to convey the property.
- (ii) The plaintiff has committed breach of contract and the second defendant had always been ready and willing and continue to be ready and willing to perform the terms and conditions by remitting the entire sum due. The plaintiff ought to have invoked the arbitration clause. A tender contract is different from ordinary enforceable contract and tender contract is subject to condition and stipulation as agreed to and it gives right to the tenderer either to accept it or to reject it. The first defendant has rejected the tender of the plaintiff rightly having regard to the terms and conditions of the contract on the ground of non-fulfillment of the essential condition. (emphasis supplied) The second defendant has adopted the written statement filed by the first defendant, which is not in variance with the contentions of the second defendant. The sum of Rs.1,97,338/- said to have been sent by the plaintiff was not within time and in accordance with the conditions of the contract. The plaintiff having committed breach of contract, with a view to cover up his omission, appears to have created a make belief story or readiness by creating self serving draft sale deeds and other correspondence. Even if the first defendant had given any assurance to the plaintiff against the right of the second defendant it is not binding on him. The plaintiff is not entitled to a decree for specific performance and the first defendant is liable to accept the tender of the second defendant and confirm it in its favour.

6. On the above said pleadings, the following issues have been framed by the Trial Court viz.:

- i) Whether time was the essence of the contract entered into between the plaintiff and the first defendant?
- ii) Whether the plaintiff is entitled to a decree for specific performance?
- iii) Whether this Court has got jurisdiction to try the suit?
- iv) To what other relief the plaintiff is entitled to?

6. On the above said issues, the parties went into trial. On the side of the plaintiff, one of its partner Thiru. Rajasekar has been examined as P.W.1 and Exs.A-1 to A-11 have been marked. On the side of the first defendant, no witness has been examined, but Ex.B-1 has been marked. On the side of the second defendant, its accountant Thiru. Govindaraj has been examined as D.W.1 and no documents have been marked.

7. On a consideration of the oral and documentary evidence adduced in the case, the Trial Court has granted a decree for specific performance in favour of the plaintiff and has also awarded costs. Being aggrieved by that, the first defendant in the suit has filed the above appeal.

8. I heard Mr. N.Sridhar, learned counsel for the appellant, Mr.S.Parthasarathy, learned Senior Counsel for the first respondent and Mr.J.Raja Kalifullah, learned counsel for the second respondent.

9. Mr.N.Sridhar, learned counsel appearing for the appellant/first defendant submitted that the first defendant by the paper advertisement Ex.A2 called for tenders and invited offers from the general public for the purchase of the suit property and another property. The plaintiff sent its tender form for the purchase of the suit property and the first defendant under Ex.A-3 dated 11.5.1985, accepted the offer of the plaintiff. As per clause 8 of the terms and conditions incorporated in Ex.B1, on or before 31.5.1985 i.e. within 20 days from 11.5.1985 the plaintiff should have paid 50% of the sale consideration and thereafter on or before 10.6.1985 i.e. within 30 days from 11.05.1985, should have paid the remaining balance amount, but without making the above said two payments, the plaintiff wrote a letter Ex.A4 dated 23.5.1985 requesting the first defendant to furnish the plan copy of the suit property to incorporate the description of the property in the sale deed. According to the learned counsel, the full description of the suit property and the particulars of other property have been furnished in the annexure to Ex.B1. He further submitted that in Ex.A2, the paper publication, it has been specifically stated that the intending purchasers may inspect the suit property between 2 p.m.and 4 p.m. on all working days from 30.1.1985 to 6.2.1985 and as such there was no need for the plaintiff to seek for the copy of the plan and other details, but only with a view to gain time, the plaintiff has sent Ex.A4. The learned counsel further submitted that clauses 8 & 9 of the tender conditions are special conditions, which should be construed as making time as the essence of the contract. Since the plaintiff failed to remit the initial payment of 50% and also the balance payment within the stipulated time as per clause 8 of the terms and conditions of tender, the first defendant invoking clause 9 of the terms and conditions of tender, vide Ex.A5 letter dated 22.6.1985, addressed to the plaintiff informed it that the offer is treated as cancelled and forfeited the Earnest Money Deposit of Rs.10,000/-.

10. The learned counsel further submitted that there is no concluded contract between the plaintiff and the first defendant.

In support of his submission, the learned counsel relied upon the

decision reported in AIR 1999 MADRAS 304 (M/s. Veera Property Development Pvt. Ltd. And etc., Vs. Tamil Nadu Slum Clearance Board).

11. The learned counsel further submitted that time is of the essence of the contract and the finding of the trial Court that in this case time is not of the essence of the contract, is erroneous. The learned counsel submitted that the trial Court has failed to see that the contract of sale in this case is not a regular contract of sale, but it is a tender sale and as such the legal principles applicable for deciding the question as to whether time is of the essence of the contract in a regular contract of sale, should not be applied in respect of a tender sale. The trial Court has failed to note this vital distinction between a tender sale and a regular contract of sale. In support of the said submission, the learned counsel relied upon the decision in the case of P.S.DURAIKANOO Vs.M.SARAVANA CHETTIYAR AND ANOTHER reported in AIR 1963 MADRAS 468 (DB).

12. Further, Mr.N.Sridhar, learned counsel for the appellant/first defendant submitted that P.W.1 in his cross examination has deposed as follows:

"டெண்டரின் condition படி நடக்காததால் எனக்கு எந்தவித உரிமையுமில்லை"

On the basis of the said admission of P.W.1, it was submitted that the plaintiff has understood that time is of the essence of the contract in this case and therefore, the finding of the trial Court is erroneous.

13. On the other hand, Mr.Rajakalifulla, learned counsel appearing for the second defendant / second respondent submitted that there is no equity in the contract between the plaintiff and the first defendant and Ex.A3 is only a confirmation of the highest bid and not an acceptance letter and as such there is no concluded contract between the plaintiff and the first defendant. The learned counsel in support of his submissions relied upon the following Judgments:

- i) 1996 (10) SCC 405 -
RAJASTHAN COOPERATIVE DAIRY FEDERATION LTD. Vs.
MAHALAXMI MINGRATE MARKETING SERVICES PVT. LTD AND
OTHERS.
- ii) 1999 (1) SCC page 1 -
RICKMERS VERWALTUNG GMBH Vs INDIAN OIL CORPORATION LTD.
- iii) Volume 96 LAW WEEKLY page 88
H.G.KRISHNA REDDY AND CO. Vs. M.M.THIMMIAH AND ANOTHER

He further submitted that he is adopting the arguments of the learned counsel for the Appellant and submitted that the offer of the second defendant being the second highest, the same should have been accepted when the plaintiff failed to perform his part of the contract within the stipulated time and when the first defendant chose to cancel the contract of sale with the plaintiff.

14. Per contra, Mr.S.Parthasarathy, learned Senior Counsel appearing for the plaintiff / first respondent submitted that by Ex.A-3, dated 11.05.1985 the first defendant had accepted the offer of the plaintiff and as on 11.05.1985 a concluded contract had been made. He further submitted that nothing further remained to be done either by the plaintiff or by the first defendant. The learned counsel further submitted that neither the learned counsel for the appellant nor the learned counsel for the second respondent submitted as to what remained to be done by the plaintiff or the first defendant after Ex.A-3 and submitted that the submissions of both the learned counsel on this aspect are not legally sustainable. The learned senior counsel submitted that though in paragraph 10 of the plaint the plaintiff has stated that time was not of the essence of the contract, the first defendant, though has adverted to the averments made in paragraph 10 of the plaint, in paragraph 10 of the written statement, it has not specifically denied the same. Based on that the learned senior counsel submitted that under Order 8 Rule 5 CPC, since the facts stated in the plaint are not denied they should be taken as admitted. The learned senior counsel referred to paragraph 8 of the plaint and submitted that the plaintiff had met the officers of the first defendant for gathering particulars between 11.05.1985 and 22.06.1985 and the first defendant made the plaintiff to understand that the particulars would be sent in due course and the plaintiff can wait to discharge its obligations till then. The general presumption in a contract relating to immovable property is that time is not of the essence of the contract and the conduct of the officers of the first defendant referred to in paragraph 10 of the plaint would show that time was not treated as essence of the contract of sale. The learned senior counsel further submitted that in Ex.A-3 the first defendant had not stated the manner in which the sale consideration should be paid. Though the plaintiff had written a letter Ex.A-4 dated 23.05.1985 and the last date for paying the 50% of the sale consideration was 31.05.1985 and though the amount was not paid by the plaintiff, the first defendant did not send any reply for Ex.A-4 and also did not cancel the contract of sale on the basis of non-payment of the 50% of the sale consideration within 20 days from the date of Ex.A-3 and no notice was sent by the first defendant to the plaintiff calling upon him to make the said payment. The learned senior counsel further submitted that even though Ex.A-4 is referred to in Ex.A-5 dated 22.06.1985 under which the first defendant sought to cancel the contract of sale, nothing has been said about the request made by the plaintiff in Ex.A-4. The learned senior counsel further submitted that the plaintiff is the promisor and the first defendant is the promisee and under Section 63 of the Indian Contract Act, the promisee, viz., the first defendant, may extend time for performance of the contract and as such the conduct of the first defendant in not insisting for the payment of 50% of the sale consideration within 20 days from the date of Ex.A-3 and the non cancellation of the contract of sale for non-payment within 20 days would show that the first defendant had extended the time for performance of the contract of sale. The learned senior counsel further submitted that the 30 days time from the date of Ex.A-3 expired on 10.06.1985 and though the plaintiff had not paid the balance 50% of the sale consideration, the first defendant did not immediately cancel the contract. But yet the first defendant while canceling the contract by issuing Ex.A-5 dated

22.06.1985 relied upon Clause-8 of the tender conditions. According to the learned Senior counsel, the above said facts are the distinguishing features from the facts of the case relating to A.I.R. 1963 Madras 468.

15. The learned Senior Counsel further submitted that when the plaintiff pleaded that time is not of the essence of the contract and the first defendant did not deny it either in the written statement or in the evidence, the Court is bound to accept the plea of the plaintiff. In support of the said submission, the learned Senior Counsel relied upon the Judgment rendered in the case of SWARNAM RAMACHANDRAN & ANOTHER Vs. ARAVACODE CHAKUNGAL JAYAPALAN reported in (2004) 8 SCC 689.

16. The learned Senior Counsel further submitted that when P.W.1 has deposed that he met Thiru Arunachalam, General Manager of the first defendant Company and he promised to give the details sought for by the plaintiff and asked the plaintiff to pay the balance amount after finalisation, the first defendant has not chosen to examine the said Arunachalam and thereby failed to produce the best evidence to substantiate its claim. In support of his submission, the learned Senior Counsel relied upon the Judgment rendered in the case of GOPAL KRISHNAJI Vs. MOHD. HAJI LATIF reported in AIR 1968 SC 1413 at 1416.

17. The learned Senior Counsel further submitted that time is not of the essence of the contract in so far as this case is concerned and relied upon the following decisions:

- i) VOLUME 30 MLJ 186 (part V) KHODARAM IRANI Vs BURJORJI DHURIJIBHAI CONTRACTOR.
- ii) AIR 1958 SC 512 KESHAVAL LALLUBHAI PATEL & OTHERS VS. LALBHAI TRIKUMMAL MILLS LTD.
- III) (1993) 1 SCC 519- CHAND RANI Vs. KAMAL RANI

The learned Senior Counsel further submitted that the intention to treat the time as the essence of the contract may be established by circumstances to displace the normal presumption and in support of that, he relied upon the decision rendered in the case of Govind Prasad Chaturvedi Vs. Hari Dutt Shastri and another and reported in AIR 1977 SC 1005 (para 5 & 6 at page Nos.1007 & 1008).

18. The learned Senior Counsel further submitted that reasonable notice was not given by the first defendant to the plaintiff before issuing Ex.A5 cancellation letter and he further submitted that no prejudice would have been caused to the first defendant if the demand draft sent by the plaintiff had been accepted and the sale deed had been executed in favour of the plaintiff.

19. The learned Senior Counsel by relying upon the Judgment rendered in the case of BORAMMA Vs. KRISHNA GOWDA reported in (2000) 9 SCC 214 (para No.10), submitted that it will not be a sound rule of appreciation of evidence to pick up an answer from the cross-examination of a witness and draw an inference taking it in isolation but the court must see as to how consistent the testimony of the witness is and as to how that answer fits in with the rest of the evidence and probabilities of the case. The learned Senior Counsel

therefore submitted that the argument advanced by the counsel for the appellant based on the isolated answer elicited from P.W.1 is liable to be rejected.

20. By way of reply, Mr.N.Sridhar, learned counsel appearing for the first defendant/appellant submitted that 10.06.1985 was the last date for payment of the sale consideration and hence the first defendant treating time as of the essence of the contract cancelled the contract of sale within 12 days from 10.6.1985 by Ex.A5 dated 22.6.1985. The learned counsel further submitted that both the plaintiff as well as the first defendant understood that time is of the essence of the contract. The learned counsel also submitted that the plaintiff, only after fully understanding the terms and conditions, made the offer and the plaintiff had understood the fact that time is of the essence of the contract. He further submitted that clauses 8 & 9 should be viewed as offeror's conditions and that is the difference between the regular contract of sale and a tender sale. He further submitted that the subject matter of sale in the case of JAMSHED KHODARAM IRANI Vs. BURJORJI DHUNJIBHAI, CONTRACTOR reported in VOLUME 30 MLJ 186, was not an immovable property but movables and therefore the law laid down therein is not applicable to the facts of this case. He further submitted that P.W. 1's evidence does not show that time was extended by the first defendant. He further submitted that the decisions relied upon by the learned Senior Counsel for the plaintiff in support of his contention that time is not of the essence of the contract are not applicable to the facts of this case, since all those cases arose out of regular contracts of sale but not out of tender sales. The learned counsel submitted that the case reported in AIR 1963 (2) MLJ 399, relates to an auction sale which is similar to a tender sale. Therefore, the learned counsel submitted that the law laid down in the decision reported in AIR 1963 (2) MLJ 399 squarely applies to the facts of this case and applying the same, the appeal should be allowed.

21. On the basis of the above submissions made by the learned counsel the following points arise for determination in the above appeal.

- (i) Whether a concluded contract has been arrived at between the plaintiff and the first defendant?
- (ii) Whether the general rule that time is not deemed to be the essence of the contract in a regular contract of sale of immovable property is applicable to a tender sale and whether time was of the essence of the contract entered into between the plaintiff and the first defendant?
- (iii) Whether the decree for specific performance granted by the Trial Court in favour of the plaintiff is sustainable?

22. (I) Whether a concluded contract has been arrived at between the plaintiff and the first defendant?:

- (a) Admittedly the first defendant advertised the sale of the suit property and one another property by Ex.A-2 fixing 14.02.1985 as the last date for submission of filled in tender forms with Earnest Money Deposit (in short, EMD) and the plaintiff submitted its tender dated 14.02.1985.

The offer of the plaintiff was accepted by the first defendant under Ex.A-3 dated 11.05.1985. In Ex.A-3 the first defendant confirmed the description of the property, its area its price per cent as offered by the plaintiff in its tender and informed the plaintiff that the plaintiff may arrange to remit the balance sale consideration of Rs.1,97,338/- after deducting the EMD of Rs.10,000/- from the total sale consideration of Rs.2,07,338/-. Further the first defendant was asked to arrange to purchase necessary stamp papers to enable the first defendant to prepare and execute the documents early. Therefore, in the considered view of this Court, nothing further remained to be done either by the plaintiff or by the first defendant after Ex.A-3 except the payment of the sale consideration by the plaintiff as per the terms and conditions of tender and to purchase necessary stamp papers to enable the first defendant to prepare and execute the sale deed. The payment of balance of sale consideration and the execution of the sale deed relate to performance of the contract of sale and they are not conditions precedent to conclude the contract. The moment the first defendant had confirmed the offer of the plaintiff and accepted the same under Ex.A-3, a concluded contract had been entered into between the plaintiff and the first defendant.

(b) In sales by auction, the announcement about the auction is a mere invitation to offer, the request for bids by the auctioneer is not an offer which can be accepted by the highest bidder, the actual bids made are all offers, each higher bid superseding the previous bid, and that when the hammer falls on the last bid, there is an acceptance and the contract becomes complete. Acceptance signifies a final and unqualified assent to the terms of an offer. It means in general, the expression of assent by the person to whom the proposal is made. The moment a person expresses his acceptance of the offer, that moment the contract is concluded, and a vinculum juris binds both the parties from which, they cannot get out, except by mutual consent. Sir William Anson, very aptly compares the offer to a train of gun-powder and the acceptance to a lighted match stick.

(c) If the above principles are applied to the facts of this case, there could never ever be an iota of doubt that a concluded contract has been arrived at between the plaintiff and the first defendant. The offer of the plaintiff dated 14.02.1985 made under Ex.A-2 had been accepted by the first defendant by its letter of confirmation / acceptance by Ex.A-3 dated 11.05.1985 and the moment the offer of the plaintiff had been accepted by the first defendant, a concluded contract had been arrived at. The tender sale of the suit property is equivalent to an auction sale and therefore the principles of law applicable to auction sale are equally applicable to tender sales. Tested in that light also it can be safely held

that a concluded contract has been arrived at between the plaintiff and the first defendant.

(d) Neither Mr. N.Sridhar, learned counsel for the appellant / the first defendant nor Mr. J.Raja Kalifullah, learned counsel for the second respondent / second defendant was able to point out as to what further the plaintiff or the first defendant had to do after Ex.A-3. Neither the terms and conditions of the tender incorporated in Ex.B-1, nor Ex.A-3 stipulate anything further to be done either by the plaintiff or by the first defendant to conclude the contract of sale. When nothing further remained to be done, as stated above, the contention of the learned counsel for the appellant as well as the counsel for the second respondent that no concluded contract has been arrived at between the plaintiff and the first defendant is liable to be rejected.

(e) The facts of the case in A.I.R. 1999 Madras 304 (Larsen and Toubro Ltd., Calcutta Vs. Neyveli Lignite Corporation Ltd., Chennai and another) are totally different from the facts of this case. In that case the contention of the writ petitioner was that 25% of the plot cost paid by the petitioner was not only received but also realized and utilized and so it amounted to acceptance under the provisions of the Contract Act. The Learned Judge did not accept the said submission on the ground that under Section 7 of the Indian Contract Act, the acceptance must be absolute and unqualified and it cannot be said that the confirmation is a formal one and by relying upon clauses 8 and 9 of the tender conditions in that case, the Learned Judge came to the conclusion that only if a successful bidder pays 25% of the plot cost, his bid will be considered for confirmation and the Chairman was having right to accept or reject any offer. On that reasoning, the Learned Judge held that the acceptance of 25% of the plot cost, though it was a part of the sale consideration and though the said amount was realized, it could not be said that it was an absolute acceptance. The above said facts are different from the facts of this case since in this case the offer made by the plaintiff has been confirmed and accepted by the first defendant. Therefore, the above said decision is not of any help to the appellant.

(f) Mr. J.Raja Kalifulla relied on the decisions reported in 1996 (10) S.C.C. 405, 1999 (1) S.C.C. 1 and 1996 Law Weekly 88. I fail to understand as to how the decision reported in (1996) (10) S.C.C. 405 is relevant to the facts of this case. In that case, the validity of the cancellation of a contract and the applicability of the Doctrine of Audi Alteram Partem was considered and it was held that when the reasons for cancellation are clearly set out in the cancellation letter and are germane to the decision not to enter into a contract with the first respondent, the extraneous circumstances cannot be relied

upon to hold the decision mala fide. Therefore, the said decision is not applicable to the facts of this case.

(g) In RICKMERS VERWALTUNG GMSH Vs. IOC LTD., reported in 1999 (1) S.C.C.1, in paragraphs 13 and 14 it is observed as follows:

"13. In this connection the cardinal principle to remember is that it is the duty of the court to construe correspondence with a view to arrive at a conclusion whether there was any meeting of mind between the parties, which could create a binding contract between them but the court is not empowered to create a contract for the parties by going outside the clear language used in the correspondence, except insofar as there are some appropriate implications of law to be drawn.

14. From a careful perusal of the entire correspondence on the record, we are of the opinion that no concluded bargain had been reached between the parties as the terms of the stand by letter of credit and performance guarantee were not accepted by the respective parties. In the absence of acceptance of the standby letter of credit and performance guarantee by the parties, no enforceable agreement could be said to have come into existence. The correspondence exchanged between the parties shows that there is nothing expressly agreed between the parties and no concluded enforceable and binding agreement came into existence between them".

If the observation of the Honourable Supreme Court of India in paragraph 13 of the judgment is applied to the facts of this case, it could be seen that there was clear meeting of mind between the plaintiff and the first defendant creating a binding contract between them. Therefore, the above decision does not in any way help the case of the second defendant.

(h) In KRISHNA REDDY Vs. M.M.THIMMIAH AND ANOTHER reported in 1996 Law weekly 88, in paragraph 9 it is observed as follows:

"It is now settled that if a document which is entered into between two parties and which is relied on as constituting a contract contemplates the execution of a further regular agreement between the parties, it is a matter of construction whether the execution of a further contract is a condition of the terms of a bargain or whether it is a mere expression of the desire of the parties as to the manner in which the original agreement should be performed. In the former case, there cannot be any enforceable contract unless the condition is fulfilled or on the ground that law does not recognize a contract to enter into a contract".

The above said observation made in that case clearly shows that the facts of the case are totally different from the case on hand and as such the said decision in no way helps the case of the second respondent. Therefore, the contention of the learned counsel for the appellant and second respondent does not merit acceptance and it is clear that a concluded contract had been arrived at between the plaintiff and the first defendant.

23. Whether the general rule that time is not deemed to be essence of the contract in a regular contract of sale of immovable property is applicable to a tender sale and whether time was of the essence of the contract entered into between the plaintiff and the first defendant?

(a) It will be useful to extract the vital clauses of the terms and conditions of the tender viz., Ex.B-1.

"(4) The sites can be inspected on any working day from 30.01.1985 to 06.02.1985 between 2.00 pm & 4.00 pm.

(5)

(6)

(7) The successful tenderer shall be intimated the acceptance of his offer and the sale confirmation letter will be posted to him within a reasonable period from the date of opening and finalisation of the tender.

(8) On receipt of intimation of acceptance of tender, the successful tenderer shall within a period of 20 days from the date of the said letter, remit 50% of the value of the site allotted to him by Demand Draft and shall within a period of 30 days from the date of the said letter arrange to pay the balance of the price and take the sale of the Site, at his cost as to stamp duty, Registration and Incidental charges. The E.M.D. shall be adjusted against the said consideration at the time of the final payment.

(9) If the successful Tenderer fails to make the initial payment as per Clause-8 above or after having made the initial payment fails to make the final payment and take the sale as per Clause-8 above, the E.M.D. paid by the Tenderer will be forfeited and the Site/Sites allotted to the defaulting Tenderer will be resold either to the Second Best Tenderer or by the re-tender and all consequential losses and expenses arising on such re-sale/re-tender will be recovered from the defaulting Tenderer.

(10) ...

(11) ...

(12) ...

(13) Any Tenderer not agreeing to comply with the Clauses 1 to 12 above is also liable to be summarily rejected."

(b) In Ex.B-1 the partner of the plaintiff has affixed his signature accepting to abide by all the terms and conditions contained therein. So the plaintiff and the

defendants are bound to abide by all the terms and conditions contained in Ex.B-1. As per Clause-7 of Ex.B-1, the first defendant intimated the acceptance of the plaintiff's offer and the sale confirmation letter Ex.A-3 was posted to the plaintiff on 11.05.1985, which is within a reasonable period from the date of opening and finalisation of the tender. In fact, it was not the case of the plaintiff that Ex.A-3 was sent beyond the reasonable period or after an unreasonable delay. But the contention of the plaintiff was that no time limit had been fixed in Ex.B-1 for sending the confirmation letter by the first defendant. But clause-7 effectively answers the said contention. The first defendant had to send the confirmation letter only within a reasonable period from the date of opening and finalisation of the tender and accordingly the confirmation letter Ex.A-3 had been sent within a reasonable period.

(c) A reading of clause-8 of Ex.B-1 shows that the plaintiff being the successful Tenderer should have, within a period of 20 days (on or before 31.05.1985) from the date of confirmation letter namely Ex.A-3 dated 11.05.1985, remitted 50% of the value of the Site allotted to the plaintiff by Demand draft and further the plaintiff within a period of 30 days (i.e. on or before 10.06.1985) from Ex.A-3 dated 11.05.1985 paid the balance of the price and taken the sale deed for the site at his cost as to stamp duty, registration and incidental expenses. The EMD shall be adjusted against the sale consideration at the time of final payment.

(d) A reading of clause-9 of Ex.B-1 shows that if the successful tender, in this case the plaintiff, fails to make any one of the payments as stipulated in clause-8, has to face the following consequences, viz.,

- i) the EMD will be forfeited.
- ii) the Site/Sites allotted to the defaulting Tenderer will be re-sold either to the Second Best Tenderer or by Re-tender.
- iii) all consequential losses and expenses arising on such re-sale / re-tender will be recovered from the defaulting tenderer.

Clause-13 of Ex.B-1 stipulates that any tender not agreeing to comply with clauses 1 to 12 is also liable to be summarily rejected. Only in satisfaction of clause-13, the plaintiff had accepted, by signing Ex.B-1, to abide by all the terms and conditions contained in Ex.B-1. Therefore, it is clear that the plaintiff as well as the defendants are bound to abide by the terms and conditions contained in Ex.B-1.

(e) Clauses-8 and 9 of Ex.B-1 are special clauses as rightly submitted by the learned counsel for the

appellant. In this context the effect of default by the tenderer and the question of forfeiture of EMD have to be considered. Earnest Money Deposit represents a guarantee that the contract will be fulfilled, in other words, "earnest" is given to bind the contract. It is part of the purchase price when the transaction is carried out. It is forfeited when the transaction falls through by reason of the default or failure of the purchaser; and unless there is anything contrary in the terms of the contract, on default committed by the purchaser, the seller is entitled to forfeit the earnest. It is settled law that forfeiture of earnest money where the amount is unreasonable would not be governed by Section 74 of the Contract Act, since it is not a penalty. Generally, earnest money forms a small proportion to the consideration to be passed by the purchaser to the seller. When the purchaser's conduct amounts to a total repudiation of the contract, the Court will not allow him to get back the earnest money on the principle that he could not be permitted to take advantage of his own wrong. In this case the earnest money fixed and paid is only Rs.10,000/- which forms a small proportion to the sale consideration.

(f) Normally in a regular contract of sale, the purchaser pays an advance, which will bear very great proportion to the totality of the consideration and the advance shall be regarded as liable to be refunded on the contract falling through.

(g) The second consequence of default being committed by the purchaser under Ex.B-1 is that the Site/Sites allotted to the defaulting tenderer will be resold either to the Second Best Tenderer or by retender.

(h) The third consequence of default being committed by the purchaser under Ex.B-1 is that the defaulting tenderer is liable to pay all consequential losses and expenses arising on such re-sale / re-tender.

(i) These types of stipulations are only found in terms and conditions relating to tender sales and auction sales alone but not in regular contracts of sale. These terms and conditions are the distinguishing features of a tender sale or an auction sale from a regular contract of sale. Only in the light of these special features, contained in Ex.B-1, the question as to whether time is of the essence of the contract in so far as the present case is concerned has to be considered. In the considered view of this court the general rule that time is not of the essence of the contract applicable to regular contracts of sale is not applicable to the suit transaction, which is a tender sale. The stipulations contained in Ex.B-1 have to be strictly construed in deciding the question as to whether the parties to the contract intended time to be of the essence of the contract.

24. Mr. S.Parthasarathy, learned senior counsel by relying upon the decision of the Privy Council in the case of Jmshed Khodaram Irani Vs. Burjorji Dhunjibhai Contractor reported in Vol. 30 M.L.J. 186, submitted that in the case of contracts for the sale of land, time is presumed in equity not to be of the essence of the contract and specific performance will be enforced notwithstanding the failure to keep the dates assigned by the contract if justice can be done and there is nothing in the express stipulations the nature of the property or the surrounding circumstances which would make it inequitable to interfere with and modify the legal rights of parties. He further submitted that an intention that time should be of the essence of the contract may be inferred from what has passed between the parties prior to the signing of the contract but not from what takes place after the contract has been entered into unless it amounts to an agreement to modify the terms of the earlier contract. There cannot be any dispute regarding the above statement of law made by the Privy Council. But what the learned senior counsel failed to see is that the above said statement of law came to be made in the context of a private / regular contract of sale and not in respect of a tender sale and therefore that will not help the case of the plaintiff. In the same judgment, it is observed as follows:

"The special jurisdiction of equity to disregard the letter of the contract in ascertaining what the parties to the contract are to be taken as having really and in substance intended as regards the time of its performance may be excluded by any plainly expressed stipulation. But to have this effect the language of the stipulation must show that the intention was to make the rights of the parties depend on the observance of the time limits prescribed in a fashion which is unmistakable. The language will have this effect if it plainly excludes the notion that these time limits were of merely secondary importance in the bargain, and that to disregard them would be to disregard nothing that lay at its foundation." Equity will further infer an intention that time should be of the essence from what has passed between the parties prior to the signing of the contract. Tilley Vs. Thomas where specific performance was refused, illustrates this class of transaction. But in such a case the intention must appear from what has passed prior to the contract, the construction of which cannot be affected in the contemplation of equity by what takes place after it has once been entered into"

If the terms and conditions in Ex.B-1 are considered in the light of the above observations made by the Privy Council, it is clear that the stipulations show that the intention was to make the rights of the parties depend on the observance of the time limits prescribed in a fashion which is unmistakable. The above said consequences that have to be faced by the defaulting tenderer plainly exclude the notion that the time limits fixed in Clause-8 of Ex.B-1 were of merely secondary importance in the bargain and in the considered view of this Court to disregard the said stipulations would be to disregard nothing that lay at their foundation. The above said view of this Court is fortified by

a Division Bench judgment of this Court rendered in the case of Pichai Moideen Rowthar Vs. Chathurbuja Das Kushal Das and Sons and others reported in A.I.R. 1933 Madras 738 : to Vol. LXV MLJ 491. In fact in this judgment the decision of the Privy Council reported in Vol. 30 M.L.J. 186 has been distinguished. In this decision, it is observed as follows:

"At one time it was suggested by Mr. Varadachariar that this is not a contract in which time was of the essence of the contract. He relied on Jamshed Khodaram Vs. Burjorji Dhunjibhai. Whatever resemblance that may be in the terms of this and the terms of that contract there are certainly important differences. That was a private contract whereas the case before us is a case of auction".

In A.I.R. 1963 Madras 468, a Division Bench of this Court relying upon A.I.R. 1933 Madras 736 equivalent to LXV MLJ 491 held as follows:

"12. We have already set out the essential terms of the auction sale. In our opinion, the conditions therein make it clear that time was of the essence of the contract. Indeed, the proper view to take of the stipulation as to payment of both the initial deposit as well as the balance of the purchase money hedged in with conditions as forfeiture and resale on default, is to consider them as going to the root of the matter of agreement, and form and conditions of the sale. This view is supported by authority. In Pichai Moideen Rowther Vs. Chaturbhuja Das Kushaldas and sons, 65 Mad L J 491 (A.I.R. 1933 Mad. 736), there was a public auction held by the mortgagee. Under the terms of the sale, the balance of the purchase money was payable within 15 days, after sale, and failing-compliance, the deposit was to be forfeited and the sale cancelled. The balance of the purchase money was not paid and the mortgagee effected a private sale in favour of a third person. The auction-purchaser came forward with a claim for specific performance. It was held that time was of the essence of the contract, and that on the default of the auction-purchaser in the matter of payment of the purchase money, the mortgagee was entitled to sell the property".

In the considered view of this Court the point under consideration here is effectively answered by the Division Bench of this Court reported in A.I.R. 1963 Madras 468. In the considered view of this Court, the conditions contained in clauses 8 and 9 of Ex.B-1 goes to the root of the conditions of the tender sale and hence it has to be held that time was of the essence of the contract. All the decisions referred to and relied upon viz.,

(i) AIR 1977 SC 1005.

(ii) (1993) 1 SCC 519.

(iii) VOLUME 30 MLJ 186

arise out of private / regular contract of sales and as such the law laid down therein are not applicable to the instant case. Further, as rightly pointed out by Mr. N.Sridhar, learned counsel for the appellant that the decision reported in VOLUME 30 MLJ 186 relates to a case of

contract of sale in respect of movable and not immovable property and as such the legal principles laid down therein are not applicable to the facts of this case.

25. Whether the decree for specific performance granted by the Trial Court in favour of the plaintiff is sustainable?

The Trial Court not only failed to consider the specific plea taken by the second defendant in its written statement, but also failed to keep in mind the distinction between a private / regular contract of sale and a tender / auction sale. The second defendant in paragraph 3 of its written statement has stated as follows:

"3. These defendant submits that a tender contract of different from ordinary enforceable contract and tender contract or subject to condition and stipulation as or agreed to it gives a right to the tenderer either to accept it or reject it. The first defendant having rejected the tender of the plaintiff which they had done so rightly having regard to the condition of the contract and in accordance with the law and on grounds of nonfulfilment of the essential condition by the plaintiff's themselves."

The first defendant in its written statement has highlighted the importance of clauses - 8 and 9 of Ex.B-1 and the necessity of its strict compliance by the plaintiff. The first defendant in paragraph 6 of the written statement has specifically stated thus,

"The plaintiff obviously wanted to indulge in protracting the proceedings to gain time. In any event the obligation to remit the amount as per clause numbers 8 and 9 cannot be altered by raising such queries regarding the description of property. The plaintiff ought to have remitted the amount as per clause numbers 8 and 9. It is not open to the plaintiff to indulge in excuses".

In paragraph 9 of the written statement it is stated thus,

"The plaintiff is trying to find some lame excuses for not fulfilling the essential terms of the tender".

Thus the first defendant in the written statement has emphasised that clauses 8 and 9 are the essential conditions of the contract which cannot be altered by seeking copy of the plan and description of the property and it was not open to the plaintiff to indulge in excuses and find some lame excuses for not fulfilling the essential terms of the tender. In the light of the said pleadings contained in the written statements filed by defendants 1 and 2, the Trial Court ought to have framed a separate issue to decide whether the general rule that time is not of the essence of the contract applicable to private / regular contract in respect of immovable properties is applicable to tender / auction sales. The failure on the part of the Trial Court to frame such an issue, in the considered view of this Court, vitiates the findings rendered by the Trial Court. Had the Trial Court framed such an issue and applied the correct principles of law that are applicable to a case of tender sale, the Trial Court would not have recorded the findings that have been recorded by it

26. This Court, inspite of best efforts made, could not lay its hands on any other decision of a larger bench of this Court or any other decision of the Supreme Court of India taking a contrary view to

the one taken in A.I.R. 1963 Madras 468 and A.I.R. 1933 Madras 736. Mr. S.Parthasarathy, learned senior counsel appearing for the first respondent has also not produced any such decision. Therefore, this Court is bound to follow the above law laid down by the two different Division Benches of this Court. If the law laid down in A.I.R. 1963 Madras 468 and A.I.R. 1933 Madras 736 is applied to the facts of this case, it has to be held that the findings recorded by the Trial Court cannot be sustained. The Trial Court has simply accepted the contention of the plaintiff that there is no distinction between a regular contract of sale and a tender sale without assigning any reasons whatsoever. The Trial Court ought to have considered the contentions put forth by the plaintiff and the defendants on this aspect, in the light of law laid down by this Court in the above said two decisions. The failure of the Trial Court to do so is a fundamental error committed by it, which resulted in the Trial Court misdirecting itself in not considering pleadings and evidence on record in the proper perspective. A strange contention has been raised before the Trial Court as well as this Court that no time limit has been fixed in Ex.B-1 for accepting the offer of the tenderers. This contention has been raised overlooking clause-7, of Ex.B-1 which has already been extracted above. As per clause-7, the acceptance of the offer and the sale confirmation letter has to be posted to the successful tenderer within a reasonable period from the date of opening and finalisation of the tender. Though no particular date is specified it is specifically stipulated that it should be within a reasonable period and in this case the confirmation letter Ex.A-3, wherein the offer of the plaintiff had been accepted by the first defendant, is dated 11.05.1985 and the date of the offer made by the plaintiff is dated 14.02.1985 and therefore the first defendant had intimated the acceptance of the offer to the plaintiff within a reasonable period as stipulated in clause-7 of Ex.B-1. The learned senior counsel did not make any submission to the effect that the acceptance of the offer made by the plaintiff was belated. Therefore, the above said contention is liable to be rejected.

27. Mr. S.Parthasarathy, learned senior counsel for the first respondent submitted that though the plaintiff has pleaded in the plaint that time is not of the essence of the contract, the first defendant has not denied it either in the written statement or in the evidence and in fact no oral evidence has been let in by the first defendant and therefore this Court is bound to accept the plea of the plaintiff. The said submission was made on the basis of the decision of the Honourable Supreme court of India rendered in the case of Swarnam Ramachandran (Smt) and another Vs. Aravacode chakungal Jayapalan reported in 2004 (8) S.C.C. 689. In paragraph 12 of the judgment it is observed as follows:-

"12. That time is presumed not to be of essence of the contract relating to immovable property, but it is of essence in contracts of reconveyance or renewal of lease. The onus to plead and prove that time was the essence of the contract is on the person alleging it, thus giving an opportunity to the other side to adduce rebuttal evidence that time was not of essence. That when the plaintiff pleads that time was not of essence

and the defendant does not deny it by evidence, the Court is bound to accept the plea of the plaintiff". The said decision has been rendered in a case arising out of a private / regular contract of sale. As far as the law laid down therein is concerned, there cannot be and there should not be any dispute. The question to be considered here is, simply because the plaintiff has alleged in the plaint that time is not of the essence of the contract and the same had not been specifically denied by the first defendant in the written statement, will it affect the effect and scope of the stipulations contained in clauses 8 and 9 of Ex.B-1 relating to the right of the first defendant to forfeit the EMD paid by the plaintiff and resell the site allotted to the plaintiff (the defaulting tenderer) to the Second Best Tenderer (Second defendant) or to resell by re-tender and the right of the first defendant to recover all consequential losses and expenses arising on such resale / retender. As pointed out above the first defendant in paragraphs 6 and 9, of its written statement has highlighted the importance of clauses 8 & 9 of Ex.B1, and the necessity of its strict compliance by the plaintiff.

28. In view of the said rights conferred on the first defendant in case of default being committed by the plaintiff and in the light of the stipulations contained in Ex.B-1 and the above pleadings contained in the written statement filed by the first defendant, it has to be held that the intention was to make the rights of the parties depend on the observance of the time limits prescribed in Clause-8 of Ex.B-1. The terms and conditions contained in Ex.B-1 unmistakably point out that the intention was to make time the essence of the contract. The essential terms and conditions of the tender sale have already been set out supra. In the considered view of this Court, the conditions therein make it clear that time was of the essence of the contract. Indeed, the proper view to take of the stipulation as to payment of both the initial deposit as well as the balance of the purchase money hedged in with conditions as to forfeiture and resale on default and the right to recover the consequential losses and expenses arising on such resale is to consider them as going to the root of the matter of agreement and terms and conditions of the sale. As rightly pointed out by the learned counsel for the appellant, and as pleaded in the written statement of the first defendant the plaintiff was finding lame excuses to gain time by asking for a copy of the plan and description of the property when the full description of the property has already been set out in the Annexure to Ex.B-1 and the description has also been mentioned in Ex.A-3. One another vital and important fact which has been omitted to be considered by the Trial Court is that even though in Ex.A-3 it is stated as follows,

"Please also arrange to produce necessary stamp papers to enable us to prepare and execute the documents early". the plaintiff had sent Ex.A-4 seeking for a copy of the plan and description of the property. The above said extracted portion from Ex.A-3 makes it crystal clear that the first defendant had requested the plaintiff to produce necessary stamp papers to enable the first defendant to prepare and execute the documents early. Thus, it is seen that the draft sale deed / sale deed was to be prepared by the first defendant only and not by the plaintiff and that being so, there is no need for the plaintiff asking for a copy of the plan or the description

of the properties. Thus, as rightly contended by the learned counsel for the appellant, Ex.A-4 had been written by the plaintiff only to gain time on one pretext or the other and if the facts and circumstances of the instant case are considered in their totality and with specific reference to the stringent terms and conditions contained in Ex.B-1, in the considered view of this Court, the failure on the part of the first defendant in not specifically denying the averment in the plaint that time is of the essence of the contract will not affect the case of the first defendant.

29. In paragraph 10 of the plaint, it is pleaded by the plaintiff that time was never agreed to be the essence of the contract. In paragraph 10 of the written statement, it is stated that the allegations made in paragraph 10 are untrue and untenable. In the written statement filed by it, the first defendant, in more than one place has referred to and emphasised that the stipulations contained in clauses 8 & 9 of the tender conditions in Ex.B1 are the essential conditions and the plaintiff was trying to find some lame excuse for not fulfilling the essential terms of the tender. Therefore, it cannot be said that the first defendant had not traversed the pleadings contained in the plaint. Where the correctness of the facts alleged in the plaint were denied but without dealing with specifically in the corresponding paragraph of the written statement, it was held in the case of SHEIKH ABDUL SATTAR Vs. UNION OF INDIA reported in (1970) 3 SCC 485 that the averments were traversed. As observed by the Apex Court in the case of SHPPING CORPORATION Vs. NISSAR EXPORT CORPORATION reported in (1981) 4 SCC 564, the denial of facts stated in a particular paragraph of the plaint is a matter of form and not of substance. Thus, when the first defendant had stated all the facts in the written statement on which it based its defence albeit without deducing legal position properly from the facts, the Court cannot reject the defence merely because the defendant has not placed legal position clearly.

30. In this context, it will be useful to refer to Order 8 Rules 3 and 5(1) of Code of Civil Procedure, 1908, which read as follows:

"Order 8, Rules

3. DENIAL TO BE SPECIFIC. - It shall not be sufficient for a defendant in his written statement to deny generally the grounds alleged by the plaintiff, but the defendant must deal specifically with each allegation of fact of which he does not admit the truth, except damages.

5. SPECIFIC DENIAL.--(1) Every allegation of fact in the plaint if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted except as against a person under disability:

Provided that the Court may in its discretion require any fact so admitted to be proved otherwise than by such admission."

31. Rule 3 has to be read with Rule 5. Reading both the rules together, it is clear that every allegation of fact in the plaint, if

not dealt with specifically and denied expressly or by necessary implication, it will be deemed to have been admitted. Further, a reading of the above said provisions makes it very clear that the allegation of fact in a plaint can be denied specifically or by necessary implication or stated to be not admitted in the pleadings of the defendant. The proviso to Rule 5(1) makes it clear that even if an allegation of fact in the plaint is not specifically denied and is taken as admitted, the Court in its discretion may require any facts so admitted to be proved otherwise than by such admission. Since the first defendant, as pointed out above, has by necessary implication namely by its averments made in paragraphs 6,9 and 10, has denied the allegation of the plaintiff that time is not of the essence of the contract, it cannot be said that the first defendant had not denied the allegation of the plaintiff.

32. It is well settled that pleadings in India and particularly in moffusil or lower Courts are not artistically drafted. Laxity is, therefore, tolerable in the interest of justice. As has been repeatedly pointed out by the Apex Court, it has been universally accepted that in India, and especially in the mofussil, pleadings should not be construed strictly. Courts are aware that pleadings are loosely drafted and hence they should not be interpreted with meticulous care so as to result in genuine claims being defeated on trivial grounds. Our laws of procedure are based on the principle that, as far as possible, no proceedings in a court of law should be allowed to be defeated on mere technicalities.

33. In the light of the above said principles laid down by the Apex Court, if the pleadings contained in the written statement filed by the first defendant are considered, it cannot be said that the first defendant had admitted that time is not of the essence of the contract though the first defendant had not specifically denied such a plea made by the plaintiff. As already pointed out above, by necessary implication, the first defendant has denied the allegation of the plaintiff that time is not of the essence of the contract.

34. Since the above conclusions reached by this Court are not based on the stray admission made by P.W.1 in his evidence, it is not necessary to consider the submissions made by the learned senior counsel based on the decision reported in 2000 (9) S.C.C. 214.

35. Next, the contention of the learned senior counsel that though P.W.1 has specifically stated in his evidence that he met Thiru. Arunachalam, General Manager of the first defendant company and he promised to give the details sought for by the plaintiff and asked the plaintiff to pay the balance amount after finalisation, the first defendant has not chosen to examine the said Arunachalam and thereby failed to produce the best evidence to substantiate its claim, has to be considered. It is no doubt true that as laid down in A.I.R. 1968 S.C. 1413, it is incumbent on a party to produce the best evidence available and if such best evidence is not produced, an adverse inference can always be drawn. But in this case, the plaintiff had neither stated in the legal notice Ex.A-7 nor in the plaint that the partner of the plaintiff met Arunachalam the General Manager of the

first defendant company, but for the first time, in his oral evidence P.W.1 has stated so. It is settled law that any amount of oral evidence, in the absence of specific pleadings, cannot be looked into. Therefore the non-examination of any witness on the side of the first defendant will not affect the case of the first defendant.

36. The case of the plaintiff regarding the alleged extension of time granted by the officers of the first defendant company has been pleaded as vaguely as vagueness could be. Neither in Ex.A-2 legal notice nor in the plaint the alleged extension said to have been given by the officers of the first defendant company has been stated with material facts and particulars such as the names of the officers concerned who according to the plaintiff granted the extension and the date on which the alleged extension was given and in the absence of specific pleading in respect of such vital particulars no oral evidence on that aspect could be looked into and therefore this Court is of the view that there is absolutely no clear pleading or evidence to hold that the officers of the first defendant company either granted extension of time or made the plaintiff to believe that he can wait till the particulars sought for by him under Ex.A-4 are furnished. It is pertinent to point out that nothing prevented the plaintiff from making the payments as stipulated in clause-8 of Ex.B-1 within the stipulated periods and thereafter to seek the copy of the plan or the details of the properties, though as pointed out above, the plan or such details were not necessary for the plaintiff as the draft sale deed/sale deed was to be prepared only by the first defendant as stated in Ex.A-3. All these vital aspects have been omitted to be considered by the Trial Court, which vitiates the findings of the Trial Court on all aspects. Therefore, the findings of the Trial Court are erroneous and against the legal principles applicable to the facts of this case and as such the decree for specific performance granted by the Trial Court cannot be sustained.

37. The learned senior counsel submitted that the relief of specific performance to be granted by the Court is a discretionary remedy as per Section 20(1) of the Specific Relief Act and as such unless the Appellate Court finds that the discretion exercised by the Trial Court is arbitrary or unreasonable, the judgment and decree could not be interfered with. This submission of the learned senior counsel stands already answered by the reasons stated supra. When the Trial Court has failed to apply the correct principles of law applicable to a tender sale, the discretion exercised by the Trial Court in granting the decree for specific performance cannot be said to be properly exercised in accordance with law. Therefore, this Court holds that the Trial Court has exercised its discretion arbitrarily without keeping in view the law that is applicable to a case of tender sale and the facts of this case and as such the judgment and decree of the Trial Court are liable to be set aside and accordingly set aside. No other submissions were made on behalf of the appellant.

38. For the foregoing reasons, the judgment and decree passed by the Trial Court are set-aside. The plaintiff is also not entitled for refund of the Earnest Money Deposit, since the first defendant is

entitled to forfeit the same as the plaintiff has committed breach of contract. The appeal is allowed, however no order as to costs.

srk/rpa

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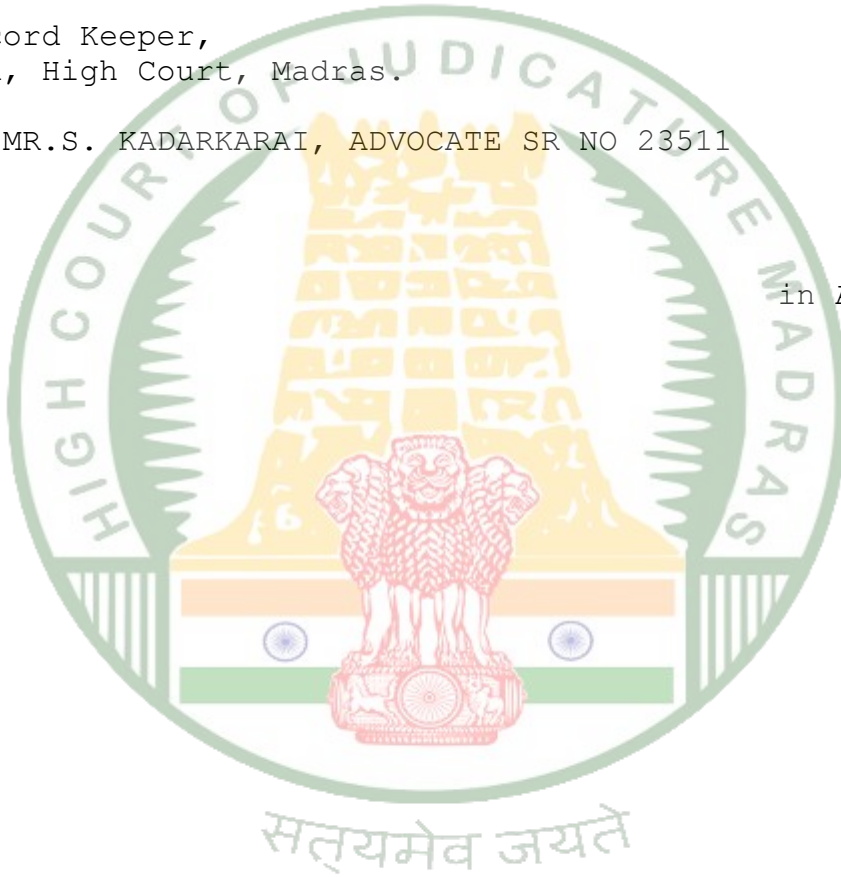
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Judgment
in A.S.No.98 of 1992

PV (CO)

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